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No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. BOX 353020
SEATTLE, WA 98195
(206) 616-3167
schnapp@u.washington.edu

ANN BUNTIN STEINER
Counsel of Record
STEINER & STEINER
214 SECOND AVENUE, N.
SUITE 203
NASHVILLE, TN 37201-1644
(615) 244-5063
asteiner@steinerandsteiner.com

Attorneys for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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I. PETITIONER'S CONDUCT WAS PROTECTED BY THE PARTICIPATION CLAUSE OF SECTION 704(a)

As we explained in our opening brief, an employer's investigation and internal procedures to prevent or correct discrimination are an essential part of the machinery for implementing Title VII. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Nothing in respondent's brief warrants denying the protections of the participation clause to workers who utilize those important employer-created mechanisms, or encouraging employees to bypass those mechanisms because only resort to the EEOC itself is so protected.

Respondent asserts that the interpretation of the participation clause advanced by Crawford and the United States conflicts with the "clear"[1], "plain"[2], and "unambiguous"[3] language of that provision. The threshold problem with this contention is that respondent cannot decide what that assertedly "clear" contrary meaning is.

On several occasions respondent asserts that the term "investigation" in section 704(a) refers exclusively to an investigation by the EEOC.

> [T]he fact that, without exception, every time "investigate" or "investigation" is used in Title

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[1] R.Br. 33, 36.

[2] R.Br. 16.

[3] R.Br. 25.

> VII it refers to an EEOC investigation, confirms that extending protection to employers' internal investigations is not the result Congress intended. . . . There are policy reasons why Congress may have chosen to limit the anti-retaliation provision's reason to participation in EEOC investigations.

(R.Br. 33).[4] Other passages in respondent's brief, however, state that "investigation" in section 704(a) refers to any investigation, including an investigation by an employer itself, so long as the investigation is "after"[5] "relative to"[6], "pursuant to"[7], "trigger[ed]" by[8], has a "connection to"[9], or "follow[s]"[10] an EEOC charge. Elsewhere in its brief respondent simply declines to take a position as to whether or not the "clear" language of section 704(a) is limited to

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[4] See R.Br. 12 ("The most significant indicia of Congress's intent is that every time the words 'investigation' or 'investigate' appear in Title VII, without exception, they refer to an investigation actually conducted by the EEOC"), 20 (every use of those terms in Title VII is "concerned with EEOC investigations.")

[5] R.Br. 11, 19, 20, 24, 35.

[6] R.Br. 34.

[7] R.Br. 16, 25.

[8] R.Br. 12.

[9] R.Br. 23, 32.

[10] R.Br. 12.

investigations by the EEOC.[11] And respondent agrees that "proceeding . . . under this title" can apply to an employer's own corrective mechanisms, objecting only that this clause is limited to employer internal procedures that occur subsequent to the filing of an EEOC charge. (R.Br. 18-19).

Respondent suggests that "investigation" in section 704(a) must mean investigation by the EEOC because in each of the other provisions of Title VII in which the term "investigation" appears it is expressly limited to an investigation of a charge by the EEOC. (R.Br. 17-19). But as the government has observed, this analysis is precisely backwards. (U.S.Br. 16-17). Because Congress in the other provisions of Title VII did expressly qualify "investigation" so that it referred only to an EEOC investigation of a charge, the absence of that restriction in section 704(a) itself indicates that the same limitation is not applicable to that provision.

The method of interpretation proposed by respondent would lead to a number of implausible results. It would mean, for example, that the participation clause would not apply to an investigation by a state or local equal employment agency, even though Title VII plaintiffs are required to complain to those agencies before filing a Title VII

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[11] R.Br. 24 ("Taken literally, the context of the term 'investigation' in Title VII *arguably* indicates only participation in EEOC investigations is protected under the statute")(emphasis added), 33 ("when Title VII was enacted in 1964 Congress intended the anti-retaliation provision to cover (*at most*) participation in investigations after an EEOC charge is filed")(emphasis added).

charge. Under section 706, in any state or political subdivision which has its own law or ordinance forbidding discrimination, an aggrieved individual cannot file a charge with EEOC without first complaining to the appropriate state or local authority. 42 U.S.C. § 2000e-5. The EEOC in turn is required to give "substantial weight" to determinations by those authorities. 42 U.S.C. § 2000e-5(b). But if the meaning of "investigation" in section 704(a) is "EEOC investigation"[12], an investigation by state and local authorities would not be protected by the participation clause, even though an aggrieved party is required to seek redress from those authorities, and despite the fact that the EEOC is directed to give weight to the results of those state and local investigations.

On the other hand, under the method of interpretation proposed by respondent, "proceeding" would include actions by those state and local agencies but not events at the EEOC itself. In the provisions of Title VII other than section 704(a), the term "proceeding" is used only to refer to state and local proceedings and to judicial proceedings, but never to actions at or within the EEOC.[13] If the proceeding clause in section 704(a) covers only actions characterized as proceedings elsewhere in Title VII, the proceeding clause would not apply, for example, to

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[12] On respondent's view that would especially true because such a state or local investigation would often occur before the filing of an EEOC charge.

[13] 42 U.S.C. §§ 2000e-5(b), 2000e-5(c), 2000e-5(d), 2000e-5(e)(1), 2000e-5(f)(1), 2000e-(f)(2), 2000e-5(k), 2000e-6(b), 2000e-6(d), 2000e-8(d).

EEOC conciliation proceedings. An employer could fire a worker for rejecting a proposed settlement offer, or for being insufficiently conciliatory in tone during the negotiations. The meaning of "testify" in section 704(a) would be entirely unclear, since it appears only in that particular provision of Title VII. And the phrase "under this title" would mean different things depending on which noun (e.g. investigation or proceeding) it modified.

Respondent's proposed method of interpretation would also exclude from protection by the participation clause a number of different types investigations conducted by the federal government itself in enforcing Title VII. If "investigation" in section 704(a) means "EEOC investigation", it would not apply to investigations by the Department of Justice. The Department of Justice would ordinarily investigate alleged violations of the three criminal provisions of Title VII.[14] The Department would also conduct its own investigations prior to filing suit under Title VII against a state or local government. 42 U.S.C. § 2000e-5(f)(1).[15] In addition, in the provisions of Title

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[14] 42 U.S.C. §§ 2000e-8(e)(unlawful disclosure of certain information), 2000e-10(b)(unlawful failure to post notices), 2000e-13(forcibly resisting EEOC officials).

[15] Under Title VII as originally enacted the Department of Justice was responsible for filing any federal pattern and practice action; its authority to do so did not depend on any person having filed a charge with the EEOC. 42 U.S.C. § 2000e-6(a). On respondent's interpretation of section 704(a), Justice Department investigations in these cases would also have been outside the scope of the participation clause.

VII relied on by respondent the term "investigate" is used to refer, not to any investigation by EEOC, but only to an EEOC investigation of a charge. (R.Br. 20-23). But under Title VII EEOC investigates matters which are not violations of section 703 or 704 and therefore would not be the subject of a charge; the EEOC, for example, might conduct an investigation into whether an employer had failed to post the notices required by Title VII, 42 U.S.C. § 2000e-10(a), or in order to respond to an action by an employer or union challenging an EEOC record keeping requirement. 42 U.S.C. § 2000e-8(c).

Respondent contends that the term "investigation" (and, presumably, the term "proceeding") in section 704(a) cannot refer to events that occur *before* the filing of an EEOC charge because the term "investigation" appears later in section 704(a) than do the words "made a charge." But the word "testified" also precedes in section 704(a) the word "investigation," even though federal testimony would only occur in court, after the EEOC investigation. If complaints to and actions by state and local authorities are covered by the participation clause, that would have to be under the terms "proceeding" or "hearing", words which also appear after "charge" and "investigation"; yet those complaints and actions ordinarily occur before either the filing of an EEOC charge or the conduct of an EEOC investigation.

Respondent's textual argument misapprehends the syntactical structure of the portion of section 704(a) in question. The participation clause lists four actions ("ma[king] a charge," "testifly]," "assist[ing]" and "participat[ing]") subject to a common modifying

phrase ("in an investigation, proceeding or hearing under this title"). That phrase necessarily modifies each of the actions, not merely "participated." "Assisted" would be meaningless without that modifying phrase explaining assistance to whom or to what. In the absence of that modifying phrase, "testified" would conceivably refer to any type of testimony in a federal forum. Correctly understood, this is not a sentence in which Congress listed "investigat[e]" in some quasi-chronological order after "made a charge", but simply used the common syntactical device of placing a phrase (including the terms investigation and proceeding) modifying all elements on a list at the end of the list itself.[16]

If the investigation clause of section 704(a) applies solely to investigations by EEOC itself, it would only protect witnesses when they were making statements to the Commission or its employees. That would leave a potential defendant free in the wake of an EEOC charge to launch its own internal inquiry and then dismiss or threaten any witness who gave an unfavorable statement to the employer, or who simply refused to talk. Some of those victims might be protected by the opposition clause, but certainly not all. (See Pet. Br. 35-38). On the other hand, if the investigation (and proceeding) clause applies only to an employer investigation that occurs after the filing of an EEOC charge, any number of paradoxical consequences would follow. An employee would be

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[16] In a phrase like "striking out, grounding out, or getting a hit in a World Series game," the listed batter actions do not occur *before* the World Series.

unprotected in a case in which both the worker and the retaliating supervisor believed, mistakenly, that a charge was pending. Retaliation, on the other hand, would be unlawful even where no one involved had any idea that there was such a charge. A worker would usually have no way of knowing whether his or her actions were protected by the participation clause by reason of the pendency of some other employee's (or perhaps a commissioner's) charge.

Respondent acknowledges that "proceeding" is not limited to actions by the EEOC itself. It argues, however, that with regard to an employer the term "proceeding" refers only to the "more formal process . . . by an employer after an EEOC charge is filed," but not to "the relative informality of an employer's self-initiated sexual harassment investigation." (R.Br. 18-19). There is, however, no reason to assume that an employer's pre-charge process would be less structured than the employer's response to an EEOC charge. To the contrary, employer internal proceedings are often highly structured. See, e.g., *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)(evidentiary hearing with witnesses held before company official; process entitled "formal investigation"[17]); *University of Tennessee v. Elliott*, 478 U.S. 788, 791 (1986)(hearing before administrative law judge lasting five months with testimony by 100 witnesses); *Alexander v. Gardner-Denver*, 415 U.S. 36, 41 (1974)(arbitration hearing). Conversely, once a Title VII charge is filed, an employer is likely to treat the matter is it would any potential lawsuit, avoiding

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[17] See Brief for Petitioner, p. 3.

contact with the employee about the subject of the charge, and assessing that charge in a confidential manner.

Section 706(c) utilizes the term "proceeding" to refer to actions by state or local authorities with regard to a possible unlawful employment practice when two circumstances are present: there is a "state or local law prohibiting the unlawful employment practice alleged" and those authorities are "authoriz[ed] . . . to grant or seek relief from such practice." 42 U.S.C. § 2000e-5(c). This characterization does not depend in any way on the formality of those state or local agency actions. Under section 706(c) a prosecutor's decision whether to "institute criminal proceedings" regarding alleged employment discrimination would constitute a "proceeding," even though that decision would often be quite informal.

Section 706(c) provides an appropriate standard for defining the term "proceeding" in other contexts. Where an employer has adopted a prohibition against a type of discriminatory conduct that is unlawful under Title VII, forbidden by Title VII (including by incorporating Title VII into the standards which the employer enforces), and has given its personnel or other supervisory officials the power to "grant or seek relief", the actions of those officials in dealing with a violation of that internal prohibition can fairly be deemed a "proceeding" under Title VII.

In this Court, the lower courts, and materials posted on its website the EEOC has taken the position that the participation clause protects involvement in

an employer's internal remedial process. Respondent contends that this position is inconsistent with the interpretation of the participation clause set out in the Commission's Compliance Manual. Each of the passages in that Manual cited by respondent, however, purports only to set out examples of what is covered by the participation clause, not to provide an exclusive list.[18]

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[18] For example, section 8-II(C)(1) states with regard to the participation clause:

> This protection applies to individuals challenging employment discrimination under the statutes enforced by EEOC in EEOC proceedings, state administrative or court proceedings, as well as in federal court proceedings, and to individuals who testify or otherwise participate in such proceedings.

Respondent, in quoting this sentence, deletes the first four words, and substitutes "[in] the Compliance Manual . . . the EEOC defines 'participation' as." (R.Br. 37). This rephrasing converts a non-exclusive list of applications into a definition. This illustrative list omits some actions which undeniably are covered by the participation clause; it contains no mention, for example, of the protections for "assist[ance]" or participation in an investigation. Section 8-II(C)(2), also quoted by respondent, states in pertinent part:

> While the opposition clause applies only to those who protest practices that they reasonably and in good faith believe are unlawful, the participation clause applies to all individuals who participate in the statutory complaint process.

(See R.Br. 37-38). This listing too is clearly not meant to be exclusive; it contains, for example, no mention of the judicial process (lawsuits would not normally be described as a "complaint process") or of providing "assist[ance]" to those involved in either administrative or judicial proceedings.

Respondent asserts that the deference otherwise due to the Commission's interpretation of section 704(a)

> must be tempered by the fact that in this very case, the agency has already determined that "there is no[] reasonable cause to believe that [Ms. Crawford's charge of retaliation] is true." 42 U.S.C. § 2000e-5(b); Cert. Br. Opp. App. 45.

(Br. Opp. 36). But what respondent is quoting is not the language of the EEOC determination in this case, but a passage from section 2000e-5(b). The actual EEOC determination is simply inconclusive:

> Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This *does not certify* that the respondent is in compliance with the statutes.

(Br. Opp. App. 45)(Emphasis added).

Section 8-II(C)(1) states:

> In the federal sector, once a federal employee initiates contact with an EEO counsellor, (s)he is engaging in "participation."

(See R. Br. 37). But this assuredly does not mean that in the federal sector the participation clause protects only those who "initiate[] contact with an EEO counsellor." That would omit, for example, testimony by most witnesses in administrative hearings, depositions, or federal court.

II. PETITIONER'S CONDUCT WAS PROTECTED BY THE OPPOSITION CLAUSE OF SECTION 704(a)

Respondent offers a variety of interpretations of the opposition clause, none of which provides a basis for dismissing petitioner's opposition clause claim.

Respondent urges that to be protected by the opposition clause an employee's actions must constitute "resistance" to the alleged discrimination. (R.Br. 27). But section 704(a) is not limited to the types of opposition likely to thwart or obstruct discrimination.[19] Respondent offers no explanation, moreover, as to why the actions of petitioner would not satisfy this proposed limitation. Respondent does not deny that Crawford's statements objected to sexual harassment by Hughes, and does not argue that such objections would not constitute resistance. Clearly if the investigators had credited the account of harassment provided by Crawford and others, and that had led to the dismissal of Hughes, their resistance would have been entirely successful. Opposition activities do not lose their protected status under

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[19] Although the distinction would not matter in the instant case, "resistance" would be an unduly narrow definition of opposition. Even where the discrimination in question has ended permanently, and there is no danger of ongoing or future discriminatory acts, an employee might seek some form of redress (e.g. back pay or compensatory time) or simply criticize management for having permitted the past acts of discrimination; such conduct would fairly be regarded as opposition within the scope of section 704(a).

section 704(a) merely because they fail to prevent future harassment.

In the alternative, respondent asserts that to be protected by section 704(a) an employee must not only resist discrimination but also go further and "communicate resistance." (R.Br. 13, 28). But an employee might oppose (or resist) discrimination in a manner that did not communicate anything. For example, if a supervisor were instructed to harass minority employees, but quietly decided to disregard that order, that would constitute opposition, even though neither the official who gave the order nor the intended victims realized what had happened. Again, moreover, respondent does not explain why the facts of this case would not satisfy even this proposed limitation on the opposition clause. The statements made by Crawford to the investigators manifestly did communicate to them that she objected to Hughes' asserted conduct. The investigators themselves expressly characterized Crawford as a "complainant." (Br. Opp., App. 9).

Taking another approach, respondent objects that

> it takes more than merely being in a re-active mode to put an employer on notice that an employee "opposes" an unlawful employment practice.

(R.Br. 3). Respondent appears to contend that an employer could never realize a worker opposed anything if the employee's statements were only made in response to an inquiry from the employer. Evidence that an employee had not initiated the meeting or

conversation in question might be relevant to a dispute as to what that employee said or how those statements would have been interpreted, but it would not be determinative. Thus the fact that Crawford was "in a re-active mode", answering questions rather than filing a complaint on her own initiative, is not conclusive of what Crawford said or meant or of how the investigators construed her statements.

Finally, respondent contends that objecting to discrimination in the course of an employer-initiated investigation is not "oppos[ition]" because such an objection could not constitute "reasonable care" to end that discrimination. (R.Br. 13, 28). But the protections of the opposition clause are not limited to the forms of opposition most likely, or likely at all, to end the discrimination in question. Respondent acknowledges that "expressing support for co-workers who have filed formal charges" would constitute opposition (R.Br. 30); such an expression might bolster the morale of those co-workers, but it would have little if any effect on the likelihood that the asserted discrimination would be prevented. In *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), this Court refused to import into the anti-retaliation provision of Title VII the employer-liability rules regarding sexual harassment articulated in *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). If an employee who were being groped by her supervisor, reasonable care under *Faragher* and *Ellerth* might require reporting that misconduct to another official; but the employee would assuredly be "oppos[ing]" harassment if she told the abuser to stop, or pushed his hands away.

As the circumstances of this case illustrate, moreover, a statement to company personnel officials describing and objecting to sexual harassment is usually entirely sufficient to constitute reasonable care to prevent that harassment, regardless of the context in which those statements were made. The investigators in the instant case understood precisely what Crawford was asserting and realized full well that she objected to the alleged harassment. Nothing further would have been accomplished if, as respondent and the court below insisted was legally required, Crawford had the next day gone to the office of the same investigators and repeated (now at her initiative) the very allegations which she had already made.

Even if Crawford had filed some sort of formal written complaint with the Director of Schools, respondent argues, that still would have been insufficient.

> It is difficult to treat Ms. Crawford's statements as "opposition" conduct because the concept of "opposition" inherently includes the notion that the employee's "opposition" is communicated to the individuals who allegedly retaliated against the employee.

(R.Br. 31). Respondent reasons that Crawford's statements could not constitute opposition unless they were known to Dr. Garcia and Chris Henson, the officials who allegedly made the decision to dismiss Crawford. (R.Br. 32).

This argument conflates the two distinct elements of an opposition clause claim. First, the plaintiff must establish that he or she engaged in protected "oppos[ition]", e.g. by objecting to action which (if it had occurred or were to occur) would be unlawful (or could reasonably be believed to be unlawful) under Title VII. Second, the plaintiff must show that the defendant took an adverse action "because" the plaintiff had engaged in that protected activity. 42 U.S.C. §2000e-3(a). A factual determination as to whether the relevant decisionmakers knew of the protected activity would be relevant to the second issue, but not to the first. A decisionmaker could not act "because of" protected activity of which he or she was unaware.[20] Whether a decisionmaker knew of (and then took action "because" of) the plaintiff's actions is a distinct issue from whether those actions themselves constituted protected activity under section 704(a).

Respondent notes that the EEOC Compliance Manual lists four "examples of opposition."[21] "None of

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[20] Where the ultimate decisionmaker relied, for example, on the advice of or information provided by a second official, an unlawful motive on the part of either could render the disputed decision unlawful. The lower courts have taken different approaches in dealing with decisions involving two or more such officials. This Court granted certiorari to resolve that question in *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 127 S.Ct. 1931 (2007)(dismissing writ of certiorari pursuant to S.Ct. Rule 46.2).

[21] The four examples are "[t]hreatening to file a charge or other formal complaint alleging discrimination," "[c]omplaining to anyone about alleged discrimination against oneself or others,"

them describes Ms. Crawford's act of answering questions during an interview." (R.Br. 38). Respondent contends that the Compliance Manual is therefore "inconsistent" with the interpretation of section 704(a) that the EEOC has advocated in this Court and the lower courts. (R.Br. 38-39). But the four "examples of opposition" in the Compliance Manual are just that, examples; nothing in the Manual suggests that the Commission believes that these are the only forms of protected activity. Respondent argues that each of the examples "require[s] initiative by the employee." (R.Br. 38). Even if each of the four examples happened to have that common element, the Manual could not plausibly be read as "requir[ing]" that same element be proven in all cases under the opposition clause. The Manual states that "[a] *complaint* about an employment practice constitutes protected activity" (emphasis added); but the Manual does not suggest that it matters whether the employer or the employee called the meeting at which the complaint was made. In the instant case, Crawford's statements about Hughes' harassment certainly constituted a complaint: she described to respondent's personnel officials conduct by Hughes to which she emphatically objected. "Complainant" is the very term which respondent's own investigators used to describe Crawford herself. (Br. Opp., App. 9).

"[r]efusing to obey an order because of a reasonable belief that it is discriminatory" and "[r]equesting reasonable accommodation or religions accommodation." Compliance Manual, section 8-II(B)(2).

III. RESPONDENT'S FACT-BASED DEFENSES CAN BE LITIGATED ON REMAND

In the proceedings below, respondent raised but the lower courts did not resolve a number of alternative factual contentions which it urged would warrant summary judgment. Although respondent to some degree renews those arguments here (R.Br. 8 n. 12, 41), they were not passed on by the district court or court of appeals, were not the subject of a cross petition, and thus are not properly before this Court.[22] Respondent is free to renew those objections on remand.

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[22] Respondent contends, for example, that Chris Henson and Dr. Garcia, officials involved in the dismissal of Crawford, did not know that Crawford was among those who had complained about sexual harassment. Yet Dr. Garcia testified he was told by Hughes that the investigation "had to do with Vicky Crawford". (J.A. p. 60-61). Likewise, Henson had been told that Crawford "testified against Hughes in terms of sexual harassment" before making the dismissal decision. (Record, 58, Response to Motion for Summary Judgment, Ex. 10, December 12, 2002 hearing p. 6-7). And rather than maintaining confidentiality, Frazier testified she makes sure that the alleged harassers and supervisors know the identity of the complaining party so that there can be no retaliation. (J.A. p. 38-40).

Respondent insists that Crawford was guilty of financial mismanagement. In opposition to respondent's motion for summary judgment, however, Crawford offered voluminous evidence to the contrary. (Record, 61, Plaintiff's Response to the Defendant's Statement of Material Facts, No. 14).

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

ANN BUNTIN STEINER
Counsel of Record
Steiner & Steiner
214 Second Avenue, N.
Suite 203
Nashville, TN 37021-1644
(615) 244-5063

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Attorneys for Petitioner